IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

FAO.No. 172 of 2005()

AS.4/2003 of IST ADDL. DISTRICT COURT, KOZHIKODE
OS.2/1997 of II ADDL.SUB COURT,KOZHIKODE
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APPELLANTS/RESPONDENTS NO.1 AND 7/DEFENDANTS 1&7:
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1. VELIKKAL ANJANEYAN, AGED 51 YEARS,
SON OF VELIKKAL MADHAVAN, BUSINESS, KASABA AMSOM,
KARAKUNNU DESOM, KOZHIKODE TALUK.

2. PAYYANAKKAL SURENDRAN, AGED 42 YEARS,
SON OF CHANDRAN, PANNIYANKARA AMSOM, DESOM OF
KOZHIKODE TALUK.

BY ADV. SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.K.JAGADEESH
SRI.T.S.HARIKUMAR
SRI.P.B.KRISHNAN

RESPONDENTS: APPELLANT AND RESPONDENTS 1 TO 6 AND 8TO12/DEFENDANTS:
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1. KANJIROLI ABDUL RAZAK, AGED 48 YEARS,
S/O. ABDURAHIMAN, BUSINESS, KATHERI AMSOM DESOM,
KOZHIKODE TALUK.

2. VELIKKAL KUNHISANKARAN, AGED 59 YEARS,
S/O. MADHAVAN, BUSINESS, KASABA AMSOM,
KARAKUNNU DESOM, KOZHIKODE TALUK.

3. VELIKKAL ANANDAN, AGED 57 YEARS,
S/O. MADHAVAN, BUSINESS, KASABA AMSOM,
KARAKUNNU DESOM, KOZHIKODE TALUK.

4. VELIKKAL PARTHAN, S/O. MADHAVAN,
BUSINESS, KASABA AMSOM, KARAKUNNU DESOM,
KOZHIKODE TALUK.

5. VELIKKAL RAGHAVAN, S/O. MADHAVAN,
BUSINESS, KASABA AMSOM, KARAKUNNU DESOM,
KOZHIKODE TALUK.

6. VELIKKAL SATHEESAN, S/O. MADHAVAN,
BUSINESS, KASABA AMSOM, KARAKUNNU DESOM,
KOZHIKODE TALUK.

7. M/S. C.M. MATHEW AND BROTHERS,
PARTNERSHIP FIRM, REPRESENTED BY ITS MANAGING
PARTNER, C.M. MATHEW, AGED 63 YEARS, 3/371-C,
PANICKER ROAD, CALICUT.

8. M. AHAMMED, AGED 41 YEARS,
S/O. MOIDU HAJI, BUSINESS, IRINGANNUR AMSOM,DESOM,
VADAKARA TALUK.

9. ABDUL HABEEB, S/O. MAMMU MASTER,
OTHAYOTH HOUSE, MANMINDA AMSOM, DESOM,
KOZHIKODE TALUK.

10. P.M. HAMEED, S/O. KANGATTU ABDULLA,
KARIAT AMSOM, DESOM, THALASSERY TALUK,
KANNUR DISTRICT.

11. V. SULAIMAN, AGED 40 YEARS,
S/O. VAYALATH POCKAR HAJI, PERINGATHUR AMSOM,DESOM
VADAKARA TALUK.

BY ADV. SRI.P.V.JYOTHI PRASAD
SRI.S.RAMESH BABU

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 08/10/2007, THE COURT ON 07/11/2007 DELIVERED THE FOLLOWING:

FAO.NO.172/2005

ORDER ON I.A.NO.2420/2005 IN FAO.NO.172/2005

Dismissed

Sd/- P.R.RAMAN, JUDGE.

Sd/- V.K.MOHANAN, JUDGE.

7/11/2007

True Copy

P.S. TO JUDGE.

P.R. RAMAN & V. K. MOHANAN, JJ.

F.A.O. NO. 172 OF 2005

DATED THIS, THE 7TH DAY OF NOVEMBER, 2007.

J U D G M E N T

Raman, J.

This is an appeal against the order of remand in A.S.4/2003 on the file of the District District Court, Kozhikode. The appellants are defendants 1 and 7, who are respondents 1 and 7 in the appeal. The suit was one for partition claimed to be on the basis of title obtained from court sale. A short, difficult, but interesting question arises in this appeal is as to whether an auction purchaser, who purchased the undivided share in an immovable property sold in execution of a money decree whose execution petition for taking delivery dismissed as time barred, is entitled to maintain a separate suit for partition and for separate possession of his share and whether such a suit is barred by Section 47 of the Code of Civil Procedure?

2. The suit property belonged to defendants 1 to 6 and their father one late Madhavan. The said Madhavan was adjudged insolvent on 31.7.1975. His 1/7th share was sold in court auction and knocked down in favour of the 7th defendant. The other six shares remained with Defendants 1 to 6. The 8th defendant filed O.S. 254/1984 before the Sub Court,

Kozhikode, for recovery of money from the first defendant. That suit was decreed and execution petition was filed and 1/7th share of the first defendant was brought to sale and in court auction, it was knocked down in favour of the 8th defendant. The sale was eventually confirmed in favour of the 8th defendant. The sale sannad Ext.A2 was issued in favour of the 8th defendant on 12.9.1992 and thereafter, the 8th defendant sold his right under the sannad to the plaintiff by Ext.A3 dated 15.2.1993. Thereafter, E.P. 129/1993 was filed (Ext.B1) by the present plaintiff and the 8th defendant jointly seeking delivery of the property through court under Order 21 Rule 95 of the Code of Civil Procedure on 20.3.1993. By Ext.A4 order, the said Execution Petition was found to be time barred and closed the matter by endorsement dated 30.10.1996. It is thereafter, that the present suit O.S. 2/1997 was filed before the Sub Court, Kozhikode on 4.1.1997 seeking partition and separate possession as stated earlier. By judgment and decree dated 16.11.2002, the trial court dismissed the same. On appeal, the appellate court, by its order impugned in this appeal, allowed the same by way of remand to the trial court. Aggrieved thereby the present appeal is preferred by the contesting defendants.

3. The suit for partition was resisted by the contesting defendants

mainly on the ground of maintainability. The trial court found that the plaintiff has no title over the plaint schedule property and the suit is barred under Section 47 of the Code of Civil Procedure. The appellate court reversed the said finding. The contention advanced by the defendants was that in the absence of any symbolic possession taken pursuant to the sale sannad issued in the earlier proceedings, a subsequent suit for partition and separate possession is barred under Section 47 of the Code of Civil procedure. This plea was accepted by the trial court. But the appellate court held that even though the auction purchaser and the transferee could not succeed in getting symbolic possession through Ext.A4 proceedings, that will not affect the title to the plaint schedule property. According to the appellate court, in order to maintain a suit for partition, it is not a condition precedent that the plaintiff should be in possession of the property with other co-parceners and that is why separate provision is made in Section 37 of the Court Fees Act in respect of payment of court fee when the plaintiff is out of possession and when he is in joint possession with the other co-owners.

4. Learned counsel Sri. P.B. Krishnan appearing on behalf of the appellant would submit that the finding of the appellate court that the suit is

maintainable and the further finding that the plaintiff has got valid title over the 1/7th share on the plaint schedule property and he is entitled to a partition by filing the suit is contrary to law and unsustainable. The learned counsel appearing for the respondent, on the other hand, would submit that what was sold and purchased being an undivided share of an immovable property, the auction purchaser and the subsequent transferee get only the right, title and interest of the undivided share held by the judgment debtor and as such, there arises no question of taking actual delivery of the property in execution. Since it is incapable of taking actual delivery and the property being not identifiable, the only remedy available is to institute a suit for partition and hence the present suit for such relief is in no way barred by Section 47 of the Code of Civil Procedure even though the Execution Petition was dismissed as time barred.

5. The point that arises for consideration is when the plaintiff failed to take symbolic delivery of the property under Order21 Rule 96 CPC and since the very execution petition was dismissed as time barred, whether the subsequent suit for partition and separate possession is maintainable under law?

6. Before we discuss the authorities on the point, we shall refer to the

relevant provisions contained in Section 47 CPC and also Order 21 Rules 95 and 96 CPC which may be necessary for a better appreciation of the rival submissions made by the parties.

Section 47:

Questions to be determined by the court executing decree --

> (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.
>
> (2) (Omitted)
>
> (3). Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.
>
> [Explanation 1.-For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.
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> Explanation II.- (a) For the purpose of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and
>
> (b) all questions relating to the delivery of

possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]"

Order 21 Rules 95 and 96 read as follows:

95. "Delivery of property in occupancy of judgment-debtor:-

Where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under Rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

96. Delivery of property in occupancy of tenant.--

Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under Rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment debtor has been transferred to the purchaser."

7. In **Laxmi Narayana Rao v. New Premier Chemical Industries** ((2005) (9) SCC 354), the apex court, after referring to Section 47 as also Order 21 Rule 95 CPC, held that a bare perusal of the aforementioned provisions would leave no manner of doubt and in particular having regard to the amendments carried in CPC by reason of the CPC Amendment Act, 1976 that the steps for obtaining delivery of property in occupancy of the judgment-debtor is required to be taken by the auction - purchaser in terms of Order 21 Rule 95 CPC and, thus, a separate suit to enforce such a right would, therefore, be not maintainable. It was also held that once the decree stands satisfied, the execution proceedings come to a end and in that view of the matter, a proceeding in the nature of one contemplated under Order 21 Rule 95 CPC is required to be initiated for the purpose of obtaining delivery of possession of the property purchased in court auction by the decree-holder and such an application must be filed within the prescribed period of limitation as provided for under Article 134 of the Limitation Act, 1963. The schedule appended to the Limitation Act, 1963 having provided for a specific provision prescribing limitation for filing an appropriate application for recovery of possession of any property in

possession of the judgment debtor, it is idle to contend that Article 136 of the Limitation Act would apply even in relation thereto. Even though a prayer was made to treat the suit as an application under Order 21 Rule 95 CPC to exercise the court's power ex debito justitiae, the said prayer was denied holding that in the case of this nature, Article 134 of the Limitation Act will apply and the suit was not filed within the prescribed period of limitation. It was noticed that the sale was confirmed in 1973 and the execution appeal filed by the judgment debtor was dismissed in 1974 in terms of Article 134 of the Limitation Act and the suit was not filed within a period of one year, the period prescribed under Article 134 of the Limitation Act for claiming the relief under order 21 Rule 95 CPC. Reference was also made to the decision in Nandarani's case (**Nandarani Mazumdar v. Indian Airlines** ((1983) 4 SCC 461) wherein it was held that in appropriate cases, the court can exercise its inherent jurisdiction to treat the application under Order 21 Rule 95 CPC. It was held that a bare perusal of the said judgment would clearly show that although it was held that a separate suit would not be maintainable for the purpose of recovery of possession of a property which was in possession of the judgment debtor,

but the relief could be granted to a decree holder ex debito justitiae by directing that the plaint be treated as an application under Order 21 Rule 95 CPC. and such a course could have been taken recourse to only if there is a finding by the trial court that the suit was within the prescribed period of limitation in terms of Article 134 for treating such a suit as an application under Order 21 Rule 95.

8. Of course, in the present case, exercising the power under ex debito justitiae does not arise since the suit is filed beyond a period of one year as prescribed under Article 134 of the Act and hence the question of treating the suit as an application filed under Order 21 Rule 95 or 96 as such does not arise. The above decision is an authority for the proposition that in case delivery is not taken in terms of Order 21 Rule 95, a separate suit for recovery of possession will be barred under Section 47 of the Code of Civil Procedure. But the learned counsel for the respondent sought to distinguish the decision by contending that in the above decision what was sold in execution was a specific item of immovable property (in execution of a money decree) which was capable of taking delivery and no separate suit for recovery alone is maintainable as per Section 47 of the Code of Civil

Procedure, whereas in the present case, what is sold is an undivided share, which is incapable of taking delivery under Order 21 Rule 95 CPC. without partition and partition is not a relief that could be comprehended under Section 47 CPC and that provision is foreign to the grant of such reliefs. According to the learned counsel for the appellant, there is no such distinction possible as far as the principle to be applied is concerned. According to him, even if actual delivery could not be taken, a symbolic delivery in terms of Order 21 Rule 96 is certainly possible and therefore, there cannot be any difference unless it is shown that at least symbolic delivery was taken in execution after the sale sannad is obtained. Otherwise, according to him, the bar under Section 47 will equally apply even in cases where what is sold is an undivided share. According to him, only when such delivery is taken, it can be said that the execution is complete. We shall examine this contention with reference to some of the authorities on the point.

9. **Manikayala Rao v. Narsimhaswami** (AIR 1966 SC 470) was a case where in a money suit , a decree was eventually passed against A and his four sons who are members of a Mitakshara Hindu Joint family. In

execution of that decree, shares of the four sons in the joint family properties, described altogether as 4/5th share, were auctioned and purchased by B whose successor in interest were the appellants. The father's share, however, was not sold. The auction purchaser thereafter sold the properties purchased by him in the auction to 'C'. Subsequently, an order was made under Order 21 Rule35(2) and 96 CPC for delivery of joint possession of properties purchased to 'C' along with the members of the family in actual possession. This order was duly carried out and possession was delivered to 'C' by publishing that fact by beat of drums. Subsequently, 'C' transferred the properties again to the auction purchaser 'B'. 'B' filed a suit, out of which the appeal arose, against the members of the family asking for partition of the joint family properties and by removing the defendants from possession. The suit was decreed. But it was held that the plaintiff was not entitled to 4/5th share but only to a 2/3rd share (which fact is not relevant for our purpose). Some of the defendants appealed to the High Court which was allowed holding that the suit was barred by limitation under Article 144 of Schedule I to the Limitation Act. Various questions raised for consideration of which only two of them survived by the decision

of the apex court - as to whether the suit was barred by limitation and whether B was entitled to a 4/5th share. While considering the question of limitation, it was held that Article 144 deals with suit for possession of immovable property or interest therein not otherwise specially provided for and prescribes a period of twelve years commencing from the date when the possession of the defendant becomes adverse to the plaintiff and the said Article obviously contemplates a suit for possession of property where the defendant might be in adverse possession of it as against the plaintiff. It is settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased; but he is entitled to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. Thus, 'B' was not entitled to possession till a partition was made. That being so, it was argued that the defendant in the suit could never have been in adverse possession. It was held that under Section 36 of the Code the provisions relating to the execution of decrees are applicable to execution of orders and in any case, the order is clearly within the terms of Order 21 Rule 96. The delivery of symbolical

possession made in this case was quite in terms of the Code and so amounted to an interruption of the respondent's adverse possession and the period of limitation for the purpose of the application of Article 144 would start from the date of such delivery. As the suit was brought within twelve years from the date of that delivery of possession, Article 144 even if it applies, does not bar it.

10. Both sides placed reliance on the above said decision. On a careful consideration of the above said decision, we find that it was a case where admittedly a symbolic delivery was taken as contemplated under Order 21 Rule 96. It was thereafter that the suit was filed for partition. The apex court observed that 'the right of the auction purchaser is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased' and that "B' was not entitled to possession till a partition had been made'.

11. In **Pattam Khader Khan v. Pattam Sardar Khan** ((1996) 5 SCC 48) it was held as follows:

> "A court sale is a compulsory sale conducted by or under orders of the court. The title of the property sold does not vest in the purchaser immediately on the

sale thereof unlike in the case of a private sale. The law requires that it does not become absolute until some time after the sale; a period of at least 30 days must expire from the date of sale before the sale can become absolute. In that, the sale is susceptible of being set aside at the instance of the judgment-debtor on the ground of irregularity in publication or conduct of the sale or on defalcation as regards deposit of money etc. as envisaged in Rules 89 and 90 of Order 21. Where no such application is made, as is the case here, the court was required, as indeed it did, to make an order confirming the sale and it is upon such confirmation that the sale becomes and became absolute in terms of Order 21 Rule 92. On the sale becoming absolute, it is obligatory on the court though, to issue the certificate. That may, for any reason, get delayed. Whether there be failure to issue the certificate or delay of action on behalf of the court or the inaction of the purchaser in completing the legal requirements and formalities, are factors which have no bearing on the limitation prescribed for the application under Article 134. The purchaser cannot seek to extend the limitation on the ground that the certificate has not been issued.

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The starting point of limitation for the application being the date when the sale becomes absolute ie. the date on which title passed, the evidence of title, in the form of sale certificate, due from the court, could always be supplied later to the court to satisfy the requirements of Order 21 Rule 95.' High court has therefore erred in taking the view view that though the sale becomes absolute on confirmation under order 21 Rule 92 CPC effectively passing title, the same can only be complete when evidenced by a sale certificate issued under Order 21 Rule 94, and that

> unless the sale certificate is issued, limitation cannot start for the purpose of an application under order 21 Rule 95 CPC, vis-a-vis, Article 134 of the Limitation Act, 1963.'

12. The question as to when does the period of limitation start for an application to be made under Order 21 Rule 95 CPC, and whether time to be reckoned from the confirmation of sale or only from the issuance of certificate, was considered in the above decision. There is however an observation in para 13 that "the period of one-year limitation, now prescribed under Article 134 of the Limitation Act, 1973, in substitution of a three-year period prescribed under Article 180 of the Indian Limitation Act of 1908, is reflective of the legislative policy of finalising proceedings in execution as quickly as possible by providing a quick forum to the auction purchaser to ask delivery of possession of the property purchased within that period from the date of the sale becoming absolute, rather than from the date of issuance of the sale certificate and on his failure to avail of such quick remedy the law relegates him to the remedy of a suit for possession in a regular way" on which strong reliance is placed by the respondent to argue that a separate suit, even though a relief under Order 21 Rule 95 may be barred under Article 134 of the Limitation Act, in our

opinion, does not support his contention in view of the later decision reported in **Lakshmi Narayana Rao's** case (2005 (9) SCC 354). Further, the question as to whether a separate suit will be barred or not as such was not considered in the above decision. What was considered in the said decision was only regarding as to what is the starting point of limitation for the purpose of filing an application under Article 134 of the Limitation Act and it was in that context it was held that the purchaser cannot seek to extent the limitation on the ground that certificate has not been issued. The starting point of the limitation is the date on which title was passed and such title and evidence of such title in the form of sale certificate could be supplied later to the court to satisfy the requirement of order 21 Rule 95 CPC.

13. In **Jagdish Dutt v. Dharam Pal** (AIR 1999 SC 1694) the apex court heldas follows:

> "When a decree is passed in favour of the joint family, the same has to be treated as a decree in favour of all the members of the joint family in which event it becomes a joint decree. Where a joint decree for actual possession of immovable property is passed and one of the coparceners assigns or transfers his interest in the subject matter of the decree in favour of the judgment debtor, the decree gets extinguished to the extent of the

> interest so assigned and execution could lie only to the extent of remaining part of the decree. In case where the interest of the coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. (Emphasis supplied) It is no doubt true that the purchaser of the undivided interest of a coparcener in an immovable property cannot claim to be in joint possession of that property with all the other coparceners. However, in case where he is already in possession of the property, unless the rights are appropriately ascertained, he cannot be deprived of the possession thereof for a joint decree holder can seek for execution of a decree in the whole and not in part of the property. A joint decree can be executed as a whole since it is not divisible and it can be executed in part only where the share of the decree holders are defined or those shares can be predicted or the shares not in dispute. Otherwise the executing court cannot find out the shares of the decree - holders and dispute between joint decree-holders is foreign to the provisions of S.47 CPC. "

14. We have gone through the facts in the said decision. That was a suit for ejectment instituted by the appellants on the ground of arrears of rent and sub-letting. The suit was decreed. Final execution proceedings were taken and there were some objection, thereto. One of the contention was that the second respondent therein was not a tenant but a trespasser.

Against that order, a revision was filed which was also dismissed granting some time to vacate the premises subject to certain conditions. Second respondent claimed that he purchased the undivided interest of the co-parcener in the Hindu Undivided Family of the decree holder and therefore, actual possession cannot be given but only symbolic possession can be given to the appellant decree holder. This contention was accepted by the execution court and that was challenged before the High court. The High Court set aside the order of the execution court and remanded the matter to investigate the quantum of share purchased by the second respondent. In that context, it was held that if a good or larger share as opposed to an insignificant share had been purchased by the second respondent khas possession cannot be given to the appellant and if only an insignificant portion had been purchased by him, khas possession shall be given to the appellant. It is against this order that the special leave petition was preferred. In that context it was held that the execution court cannot find out the shares of the decree holders and dispute between joint decree-holders is foreign to the provisions of Section 47 of the Code of Civil Procedure. Order 21 Rule 15 enables a joint decree holder to execute a

decree in its entirety; but if whole of the decree cannot be executed, this provision cannot be of any avail and in that event also the decree holder will have to work out his rights in an appropriate suit for partition and obtain necessary relief thereto.

15. The apex court, in the above decision, thus, was considering the scope of the power of the execution court to give possession in the case of an undivided share in a coparcenary property and held that the appropriate remedy is to institute a suit for partition.

16. In **K.N. Krishnappa v. T.R. Gopalkrishna Setty** (AIR 1997 KARNATAKA 152) it was held that a separate suit for declaration of title and recovery of possession by a decree holder who purchased the suit property in execution of a decree in a mortgage suit where the sale was confirmed and certificate issued, is not maintainable. In that case, in spite of the confirmation of sale, the judgment debtors remained in possession and enjoyment of the property. Claiming that he became the owner of the property by virtue of the court sale, the decree holder filed the suit for declaration. It was held that the question regarding delivery of possession to the auction purchaser or his representative is a matter relating to

execution, discharge and satisfaction of the decree within the meaning of Section 47 CPC and by virtue of sub-section 1 of Section 47 determination of such questions by a separate suit is barred.

17. **State of Travancore-Cochin v. Lakshmi Ammal Meenakshi Ammal** (1957 KLT 1094) was a case where delivery was taken in execution of the decree symbolically. Whether a suit for recovery based on title is maintainable at the instance of the decree holder- auction purchaser, even against the judgment debtor and his representatives arose for consideration therein. It was observed that once delivery has been taken in execution of the decree, even if it be only symbolical as referred to in Order 21 Rule 35(2) and Rule 36 (of the old Code) a suit for recovery based on title will be maintainable at the instance of the decree holder auction purchaser even against the judgment debtor and his representatives because symbolic possession has to be treated as actual possession where the suit is against the judgment debtor or his representatives. But in that case, it was found that actual delivery in execution was claimed to have been obtained by the plaintiff.

18. In **Lakshmanan Pillai v. Subhashini** (1971 KLT 850) it was

held that until recovery of possession is also obtained in pursuance of the sale certificate, the decree is not satisfied, so that the suit to recover possession in pursuance of the sale certificate will be hit by Section 47 since the execution and discharge of the decree has not yet come to a close. The Bench held that 'Section 47 is in the statute book for a purpose, viz, to prevent multiplicity of suits, and the way the section has been interpreted by the various High Courts which take the same view, is only in conformity with that intention. Though a contrary view was expressed by other High courts, this Court did not agree with the same in this regard. Though in that case also, there was a prayer made to convert the suit into a proceeding under Section 47 this Court held that under Section 47 a suit can be converted into a proceeding in execution subject only to any objection as regards limitation or jurisdiction. There, in the plaint itself, the averment was that the execution petition filed by the appellant before the executing court was dismissed as time barred and there was no appeal against the said order and it has become final. Therefore, the prayer for conversion cannot be allowed. This decision is an authority for two propositions ie. the provisions contained in Section 47 CPC will be

attracted in a subsequent suit instituted and unless recovery of possession is obtained in execution of the decree earlier passed pursuant to the sale certificate the execution and discharge of the decree will not be complete unless delivery is taken. It is also an authority for the proposition that conversion is possible only if the suit itself is filed within the period of limitation as prescribed for and application for delivery is not barred.

19. **Parbati Devi v. Purna Patra & Ors**. (1997(3) Supreme 132) was a case where an auction purchaser who had possession of 1/4th specific share. Subsequently, he sold the same by registered sale deed who again sold it to the appellant. The appellant filed the suit for partition. The respondent purchased the other properties from the judgment debtor in the suit. They disclaimed the purchase made by the predecessor in interest of the appellant and the sale in his favour. The trial court decreed the suit and the appellate court confirmed the same for partition of 1/4th share and delivery of possession by metes and bounds. But the High court reversed the decree holding that there is no proof of possession of property delivered under the court sale. The view of the High court was found to be in error in holding that there was no proof of possession. On a summoning

of the court register which contained an entry regarding delivery of possession and on a reading of the register of delivery of possession read with the sale certificate, it was obvious that what was delivered to the predecessor of the appellant was the property mentioned in the sale certificate and thus he became the co-owner.

20. In **Harnandrai Badridas V. Debidutt Bhagwati Prasad** ((1973) 2 SCC 467) it was held that after the amendment of Section 47, the purchaser at a sale in execution of a decree, whether he is the decree-holder or not, is unquestionably a party to the suit for the purpose of Section 47 and all questions arising between the auction purchaser and the judgment debtor must be determined by the executing court and not by a separate suit.

21. In **Velayudhan Pillai v. Ouseph** (AIR 1953 TRA-CO. 574) the suit was for recovery of possession with arrears of rent. The property in question was put in possession of the first plaintiff for a life estate with liberty to encumber the same, which privilege was availed of by him. The mortgagee filed a suit which ended in a decree for sale. In execution thereof, the property was purchased by the decree holder. He did not,

however, apply for or obtain delivery of possession which could at that time have been only symbolical because the property was outstanding with the defendant as lessee under the first plaintiff who was the judgment debtor. While dealing with the matter, the Court observed thus:

> "The courts below, it would appear, were of the opinion that notwithstanding the sale the defendant is liable to pay rent to the 1st plaintiff and to the superior lessee, the 2nd plaintiff because his possession has not been disturbed by the purchaser at the auction sale as he did not apply for and obtain delivery. The title to property sold in execution of a decree in court auction sale passes to the purchaser on confirmation and the judgment debtor thereupon ceases to have any title or interest therein. No doubt, the Code of Civil Procedure confers a right to the purchaser to apply for and obtain delivery of the property in enforcement of the sale certificate by an application made in that behalf to the court. Such an application or delivery pursuant thereto is not necessary to vest title in the purchaser. It is open to the purchaser to straight away file a suit against the party in possession if he be not the judgment-debtor, and obtain whatever relief he is entitled to as purchaser. The circumstances, therefore, that the purchaser had not taken delivery of possession is not one that militates against the completeness of the title obtained by him at the auction sale which was confirmed."

22. Based on the discussions as above, we may now formulate our conclusions as follows:

(i) If a specific immovable property is sold in execution of a decree, it is imperative to take delivery of the same to make the execution complete within the time as allowed by Article 134 of the Limitation Act failing which a separate suit for recovery of possession is barred under Section 47 of the Code of Civil Procedure. (see 2005 (9) SCC 354).

(ii) In case no such application is filed within the prescribed time, instead a suit is filed within the said prescribed time, then the court in appropriate cases can convert the suit into an application under Order 21 Rule 95 CPC ex debito justitiae and grant relief.

(iii) In a given case if actual physical possession cannot be taken, symbolic possession taken under order 21 rule 96 will have the same effect as though a khas possession is taken, as against the judgment debtor.

(iv) Effective title to the goods passes on the sale becoming absolute on confirmation. (see 1996 (5) SCC 48)

(v) In case where the interest of the coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. (see 1999 SC 1694).

(vi) If the property sold in execution is the undivided share of the judgment debtor, the decree holder or any one claiming under him, may take symbolic delivery of the same under Order 21 Rule 96 of the Code and will have the same effect of actual possession as against judgment debtor and will be deemed in joint possession thereafter with the other sharers. But in case no such delivery is taken, separate suit for partition as such will not be barred under Section 47 of the Code. But if possession becomes relevant in any given case and in the absence of such symbolic delivery, the judgment debtor will be deemed to continue in possession and rights determined accordingly.

(vii) Section 47 of the Code provides for relief and bars fresh suit to obtain such relief. In so far as partition is not a relief to be granted thereunder, there cannot be a bar to institute a fresh suit for such relief of partition.

23. In the result, we are of the opinion that the undivided share in an immovable property when sold in court auction, the auction purchaser or anybody claiming under him though entitled to apply for symbolic delivery under Order 21 Rule 96 CPC, since actual delivery of possession may not be possible, but failure to take such symbolic delivery will not be a

bar under Section 47 of the Code to institute a suit for partition. The proper remedy of a purchaser of an undivided share is only to institute a suit for partition and separate possession. We therefore confirm the order of the court below and dismiss this appeal.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-